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No. 113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between an attorney for a corporation and an employee of that corporation in situations where, in the words of the Court of Appeals, "the employee makes the communication at the direction of his superiors in the corporation and * * * the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment"?

2. Whether the Court of Appeals properly exercised its discretion in issuing a writ of mandamus to direct that, in accordance with the above test, plaintiffs' counsel should not be permitted access to 17 attorneys' memoranda which reflect communications between the attorneys and employees of their corporate clients?

STATEMENT OF THE CASE

The petition herein arises out of discovery proceedings in a number of private antitrust treble damage actions (alleging price-fixing in the sale of library editions of children's books) which have been consolidated for pretrial purposes (pursuant to 28 U.S.C. § 1407) before petitioner, Honorable Bernard M. Decker, Judge of the United States District Court for the Northern District of Illinois. The petitioners here are, in addition to Judge Decker, various plaintiffs in those treble damage actions ("plaintiffs"); respondents here are some of the defendants in those actions ("defendants").

In particular, the petition relates to plaintiffs' efforts to obtain disclosure of 17 attorneys' memoranda. Each of those memoranda was prepared by an attorney for one of the corporate defendants, and describes the attorney's confidential communications with an employee of his corporate client. The employees in question were sales executives, regional managers, and sales personnel, each of whom conferred with an attorney for his corporate employer regarding his appearance before a federal grand jury (App. 14, 17, 23-24).

The 17 attorneys' memoranda, as well as various other documents, were the subject of a motion for production of documents which plaintiffs filed in August, 1969. At that time, defendants opposed disclosure of the 17 attorneys' memoranda on the ground, *inter alia*, that their confiden-

tiality was protected by the attorney-client privilege. On August 7, 1969 Judge Decker ordered defendants to submit under seal all memoranda which they claimed were protected by the attorney-client privilege, and to file, with respect to each such memorandum, "a precise factual statement setting forth the circumstances under which the document was prepared" (App. 6).*

Accordingly, defendants' counsel filed affidavits and factual statements which were limited in scope to the requirements of that order: the statements described only the circumstances under which the attorneys' memoranda had been prepared, but *not* their contents. Since the 17 attorneys' memoranda are still held under seal and have not been read either by Judge Decker (App. 14, n. 11) or by the plaintiffs, the record offers no support for plaintiffs' various assertions with respect to the contents of those memoranda (Pl. Br., pp. 18, 29, 32-33, 36).

In an opinion dated October 7, 1969, Judge Decker concluded, *inter alia*, that the attorney-client privilege did not extend to the 17 attorneys' memoranda. He held that the privilege preserves the confidentiality of communications

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* By requiring that the memoranda be submitted under seal, Judge Decker obtained possession of them before he ordered their disclosure. He subsequently ignored requests by various defense counsel that the memoranda be returned to them (*e.g.*, App. 98). As a result, Judge Decker precluded defendants from disobeying his order directing disclosure of the documents, and from obtaining appellate review of that order through a contempt proceeding. Ordinarily, of course, a litigant can obtain appellate review of a disputed discovery order in that manner. *Cf. Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951). Because Judge Decker also refused to certify the issue for interlocutory review pursuant to 28 U.S.C. § 1292(b), defendants could obtain immediate appellate review of his order only by petitioning the Court of Appeals for a writ of mandamus.

between an attorney for a corporation and an employee of the corporation *only* if the employee is (1) "a responsible member of the corporation's management or control group," who is (2) seeking "legal advice about corporate affairs," *and* who also is (3) "in a position to influence the decision about which legal counsel is sought" (App. 16). Judge Decker found that only two of the attorneys' memoranda before him met that test.

In the same October 7, 1969 opinion, Judge Decker ordered disclosure of the grand jury testimony of nine individuals who allegedly had been evasive and recalcitrant at their depositions.* He also ordered production of certain other attorneys' memoranda (not among the 17 at issue here) which defendants had contended were protected only by an attorney-client privilege arising out of *personal* (as distinguished from *corporate*) attorney-client relationships, by the work product doctrine, or by both. We refer to these other portions of Judge Decker's decision, which are not in issue here and which were concerned primarily with memoranda reflecting attorneys' conferences with other witnesses not here involved, because plaintiffs' brief (pp. 4-5, 31-32) relies on statements made by Judge Decker in connection with his determination of these other issues.

On October 17, 1969, Judge Decker entered an order incorporating the rulings which he had made in his October 7 opinion. Defendants requested that the order include a statement of certification pursuant to 28 U.S.C. § 1292(b), so as to permit an immediate appeal with respect to certain questions raised by the opinion and order, but Judge Decker denied the requested certification.

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*Only five of those persons are among the 17 who are the subjects of the attorneys' memoranda which are at issue here.

Defendants thereupon petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus compelling Judge Decker to vacate certain portions of his October 17, 1969 order. After the filing of briefs, the Court of Appeals held, in an opinion dated February 4, 1970, that the "control group" test was unsound as a matter of law, and issued a writ of mandamus to prevent disclosure of the 17 memoranda which reflect attorneys' communications with employees of their corporate clients. In concluding that the protection which the attorney-client privilege affords to corporate clients should not be limited by the "control group" test, the Court of Appeals said:

> "We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.
>
> "It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.
>
> "We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." (App. 63.)

The opinion of the Court of Appeals concluded that

> "* * * because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (App. 63.)

The Court of Appeals declined, however, to issue a writ of mandamus preventing disclosure of the attorneys' memoranda for which defendants had claimed confidentiality by virtue of a personal attorney-client privilege of each witness, and/or the work product doctrine.*

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* The Court of Appeals did not discuss the merits of Judge Decker's novel ruling that where an attorney confers with an employee of his corporate client regarding the employee's grand jury testimony, no *personal* attorney-client privilege can properly be asserted to protect the confidentiality of their communications, *unless* the attorneys either "(1) render personal legal advice after the witnesses complete their grand jury testimony, (2) advise them on other, personal matters [unrelated to their grand jury testimony], or (3) bill the witnesses for their [legal] services" (App. 15-16). Instead, with respect to the claim of *personal* attorney-client privilege, the Court of Appeals held that the corporate defendants could not properly assert a personal privilege on behalf of the individuals involved, and also that "the existence of personal attorney-client relationships [was not] so clearly established that mandamus is appropriate to compel the district court to recognize the privilege which would arise therefrom" (App. 61).

The Court of Appeals also declined to issue a writ of mandamus with respect to the claim of work product protection, holding that "lack of good cause [for disclosure of attorneys' work product] has not been made to appear sufficiently for issuance of a writ of mandamus", even though "more specific findings [of good cause] as to each individual would have been better" (App. 65). The Court of Appeals did conclude, however, that "the district judge incorrectly suggested that some of the memoranda did not qualify

(continued on p. 7)

The issue which the petition for certiorari brings before this Court is whether the Court of Appeals properly concluded that the "control group" test is unsound as a matter of law. The importance of that issue and the consequences of this Court's resolution of it far transcend the limited significance of the 17 attorneys' memoranda whose confidentiality was protected by the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

I

A. The attorney-client privilege is predicated upon the belief that it is in the public interest to encourage free and candid communications between clients and their attorneys, by protecting the confidentiality of such communications. *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915); *Chirac* v. *Reinicker*, 11 Wheat. (24 U.S.) 280, 294 (1826). The privilege extends not only to individual clients but also to corporations who, of course, act through their agents and employees. The privilege always has been deemed to include communications between the attorney and the client's agents (8 Wigmore, *Evidence*, § 2317).

The decision of the Court of Appeals, unlike the "control group" test applied by Judge Decker, is consistent with this long-established doctrine and the reasons which support it. The attorney-client privilege enables a lawyer to give legal advice and perform legal service on the basis

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(footnote continued from p. 6)

as work product because 'the lawyers functioned primarily as investigators' ", and that the correct rule is that "Where an attorney personally prepares a memorandum of an interview with a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator" (App. 64).

of full and candid disclosure of the facts known to his client. An attorney should not be confronted with the dilemma of either advising his client without knowledge of all relevant facts, or of obtaining the necessary information from the client's agents and employees at the risk of having to divulge it to an adverse party. Since first-hand knowledge of relevant facts is usually possessed by corporate agents or employees who are not members of the "control group", the practical effect of the "control group" test would be to deprive corporations of the protection of the attorney-client privilege with respect to most of what they do.

The "control group" test produces the incongruous result that subordinate corporate employees for whose conduct a corporation is liable, and whose knowledge is imputed to it, cannot speak confidentially to the corporation's attorneys about the acts which they performed on the corporation's behalf.

In addition, under the "control group" test a corporation's lawyer could not give advice in confidence to the many officials or employees below the "control group" level whose conduct is to be guided by that advice, such as the sales managers or salesmen involved in price fixing cases such as these. In order to be most effective, legal advice must be given directly to those persons whose conduct is to be affected or influenced by it.

The privilege serves the public interest not only because it enables persons to benefit from soundly based legal advice, but also because such advice induces compliance with the law. This deterrent effect of the privilege is especially important in the case of corporate clients, which frequently face complicated and difficult legal questions.

The public interests which the privilege serves would be thwarted to a substantial extent by adoption of the "control

group" test, which would render the privilege inapplicable to most communications between corporate attorneys and employees of corporations.

B. Despite plaintiffs' efforts to convey the contrary impression, the overwhelming weight of authority supports the decision of the Court of Appeals rejecting the "control group" test. Except for the few "control group" cases cited by plaintiffs, federal and state courts have held uniformly over the years that the privilege covers communications between an attorney for a corporation and its agents and employees, without any "control group" limitation. Wigmore, the Model Code of Evidence, the Uniform Rules, and other commentators are to the same effect. The one court of last resort which has recently considered the problem, the Supreme Court of California, rejected the "control group" test in favor of a rule similar to that adopted by the Seventh Circuit here (*D. I. Chadbourne, Inc.* v. *Superior Court*, 60 Cal.2d 723, 36 Cal. Rptr. 468, 388 P.2d 700 (1964)).

In devising the "control group" test in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa., 1962), District Judge Kirkpatrick seemed to assume that because an individual client who consulted an attorney would have personal knowledge of the facts and also would be in a position to decide what to do on the basis of the attorney's advice, the privilege should apply only to attorneys' communications with corporate employees who have exactly the same characteristics. But seldom would the corporation's employees best able to inform the attorney of the relevant facts be the employees responsible for obtaining legal advice and for determining what action the corporation should take in light of it. Judge Kirkpatrick manifested no awareness that the effect of his theory would generally make the privilege unavailable for corporate clients, nor did

he give any reason why that result would be in the public interest. The few decisions which have followed Judge Kirkpatrick similarly offer no supporting rationale; they merely quote Judge Kirkpatrick (or each other) without discussion or explanation, and without recognition that the overwhelming weight of authority is to the contrary.

C. Plaintiffs' brief presents no arguments which justify either the "control group" test or disclosure of the communications at issue here. It completely disregards the public interests which are the basis of the attorney-client privilege, for corporate as well as other clients, and treats the privilege as a mere device for the suppression of evidence. But the privilege does not preclude a litigant from resorting to any source of information which would have been available if his adversary had not consulted an attorney.

Although plaintiffs' brief does not say so explicitly, its repeated references to the needs of plaintiffs in private antitrust cases and to the alleged peculiarities of "debriefing" memoranda imply that the privilege should be narrower in such situations. But none of the "control group" cases, including Judge Decker's opinion here, contains any such suggestion; each treated the "control group" test as a general rule of evidence. It is true that any litigant, here and in all other litigation, would be helped by disclosure of communications between his adversary and the adversary's attorney. But, as this Court held in rejecting a similar argument in *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), "framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory." As in *Hickman*, the problem presented here "far transcends the situation confronting this petitioner," and must be viewed "in light of the limitless situations to which the test espoused by plaintiffs would apply" (*ibid.*).

II

Although, of course, mandamus does not lie to correct all erroneous interlocutory rulings on questions of law, this Court has long recognized that in exceptional situations mandamus may properly issue "to confine an inferior court to a *lawful* exercise of its prescribed jurisdiction," and that "the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 25-26 (1943) (emphasis supplied); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 109-110, 112 n. (1964); *Ex parte Peru,* 318 U.S. 578, 584 (1943). Such power is "exercised only where a question of public importance is involved" (*Ex parte Peru,* at 585), and when no other adequate remedy is available.

As shown in Point I, the "control group" test, contrary to a previously uniform line of authority, substantially nullifies the attorney-client privilege for corporate clients, and thereby in large part contravenes the public purposes which the privilege serves. Unreversed, Judge Decker's ruling would generally inhibit free communications between corporate clients and their attorneys, at least in the Seventh Circuit.

The question raised here is thus clearly of extraordinary importance. The scope of the attorney-client privilege as applied to corporate clients is of more substantial consequence than the questions regarding the meaning of statutes or court rules which were raised in other cases where this Court held mandamus to be an appropriate remedy. For here the Bar, the entire business community, and a vast quantity of litigation in which they are engaged will be affected.

To allow writs to issue in the rare cases of this sort does not undermine the general policy against piecemeal appeals,

inasmuch as Congress reenacted both the final judgment and the all-writs statutes with knowledge that the latter had been construed to allow the courts a safety valve for dealing with exceptional situations.

Plaintiffs take the position that because Judge Decker's ruling followed a few decisions in other jurisdictions, the Court of Appeals could not issue the writ. But when a question of law is so important as to justify immediate determination by an appellate court, an authoritative determination of the correct rule of law for the area over which the appellate court has jurisdiction is no less necessary because some noncontrolling authorities elsewhere may support the trial court's view.

The opinion of the Court of Appeals reflects the care with which it approached the problem of whether mandamus should issue. Clearly that Court did not abuse its discretion in holding that the question whether the attorney-client privilege would remain applicable to most business transactions was of sufficiently exceptional importance to warrant issuance of the writ.

ARGUMENT

I. THE "CONTROL GROUP" TEST UNREASONABLY RESTRICTS THE SCOPE OF THE PROTECTION WHICH THE ATTORNEY-CLIENT PRIVILEGE AFFORDS TO COMMUNICATIONS BETWEEN CORPORATIONS AND THEIR ATTORNEYS.

The importance of the attorney-client privilege is recognized not only in the United States but generally in other countries (see *infra*, pp. 27-28, 36). Its acceptance is predicated not only upon the belief that the client is entitled to its protection, but also upon the belief that the public interest is served where a person is enabled, through

well-informed legal advice or service, to conform his actions to the standards imposed by the laws of his country. It recognizes the fact that, human nature being what it is, a person in need of legal advice or legal service will not speak as freely to his attorney if his statements are subject to subsequent disclosure as he will if he is assured that those statements will be held in confidence.

It also has been generally recognized, again both in this country and abroad, that if it is in the public interest that an individual be permitted to talk to his attorney in confidence, it is equally in the public interest that all of the many employees and other agents through whom a corporation acts (and by whose actions a corporation is bound) should be permitted to talk in confidence to counsel for the corporation about information which they have obtained in the course of their employment. If the attorney-client privilege serves a useful purpose in the case of an individual, then it does so even more in the case of a corporation which has numerous employees and agents through whose conduct it might possibly violate some law.

Moreover, the competent attorney, in talking to a client (or to the client's employees and agents), is not, as plaintiffs would have this Court believe, a mere recording machine. He is as much an inquisitor as he is a defender. His purpose is to uncover the area or areas in which the legality of his client's actions may be questioned, whether justifiably or unjustifiably. He cannot render sound legal advice or perform competent legal service unless he knows just what action his client has taken or is contemplating, and can consider all of the implications of such action, including the inferences which may be drawn therefrom.

The instant litigation involves a charge of price fixing, and nothing could serve better to illustrate the importance

of the attorney-client privilege, its necessary scope, and the role played by counsel in protecting the interest of the public as well as the interest of his client. An investigation by counsel of the pricing and distribution practices of his corporate client may (as in the instant case) be the result of a grand jury inquiry, or it may result from a complaint made to the corporation, or commencement of litigation (either a private suit or a suit brought by a governmental agency), or an internal review instituted by management. Whether or not the attorney becomes involved in litigation instituted against his corporate client (which is primarily a matter of private concern to the client), he will in virtually every instance be advising the corporation as to the proper course of conduct which it should pursue in the future—a matter of serious concern to the public.

If the pricing or distribution practices of a corporation are under scrutiny, the attorney's inquiry must usually be broad in scope, and must be defined by counsel rather than by the client. The client may have in mind only the sanctions against price fixing, but counsel may well conclude that possible monopolization, price discrimination and product tie-in are related issues which also have to be considered. If it is to be effective, the attorney's investigation must reach all employees or agents of the client, so that he may know the totality of what the client is doing and for what acts the client may be held responsible.

The investigation which counsel makes, protected as it is by the attorney-client privilege, conceals nothing from the client's opposing litigants, whether they are public or private. The same avenues of discovery are open to the client's adversary after the client (or his agent) has communicated with the attorney as were open prior thereto. The same documents remain available, and the same persons remain subject to questioning in the same manner. The attorney-

client privilege does no more than protect the confidentiality of communications between client and counsel, and prevent an adversary from using the client's attorney as a means of gathering information or developing theories of legal liability for use against the client.

Judge Decker's opinion would preclude application of the privilege to the communications specifically under consideration here, *not* because of any facts peculiar to this case, but rather because of his decision that in all corporate situations the privilege should apply only to communications between counsel and a very restricted number of corporate executives, to-wit, those who are responsible members of a corporation's management or "control group", who are seeking legal advice about corporate affairs, *and* who also are in a position to control the corporation's decisions regarding the issues about which legal advice is sought. Thus counsel could, in confidence, talk to and obtain information from the corporation's president but not a district sales manager, even though the latter might be the only agent of the corporation who has first-hand knowledge of the facts pertinent to the legal advice sought from, or the legal services to be rendered by, the attorney. Similarly, under the "control group" test counsel could, in confidence, advise the corporation's president about the pitfalls to be avoided in connection with the pricing of the corporation's products, but he could not so advise the district sales manager—the man on the firing line whose duties are such that he, rather than the corporation's president, would be more likely to involve the corporation in a charge of price discrimination or price fixing.*

* In the instant case, Judge Decker held that the privilege did not apply to attorneys' communications with "sales executives and regional managers [who] might have shaped the pricing policies concerning library editions" (App. 17).

Neither reason nor the authorities support such a wholly unjustifiable erosion of the attorney-client privilege, as defendants will demonstrate.

A. Adoption of the "Control Group" Test Would Contravene the Purposes Underlying the Attorney-Client Privilege.

This Court has recognized repeatedly since at least 1826 that the public interest demands maintenance of the attorney-client privilege, so that a client may communicate freely and confidentially with his attorney regarding the attorney's efforts to provide sound legal advice and competent legal service. In *Chirac* v. *Reinicker*, 11 Wheat. (24 U.S.) 280, 294 (1826), the Court, through Mr. Justice Story, declared that "it is indispensable for the purposes of private justice" that our legal system preserve the confidentiality of facts "communicated by client to counsel" in confidence.

Similarly, in *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915), this Court stated:

> "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance."

Despite plaintiffs' suggestion to the contrary (Pl. Br., p. 22, n. 20), it is clear that the attorney-client privilege applies to corporate clients as well as to individual clients. *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318 (1915), *supra*, which upheld a claim of privilege asserted by a corporation; *Bell* v. *Maryland*, 378 U.S. 226, 263 (1964)

(Appendix to concurring opinion of Justice Douglas); *Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314 (7th Cir. 1963), *cert. den.* 375 U.S. 929 (1963). And, as the Seventh Circuit recognized in its *Radiant Burners* opinion, "where a corporation is the client, it must act through its officers and its agents" (320 F.2d at 323).*

The Seventh Circuit's decision in *Radiant Burners* was in substance an application of the long-established rule that the privilege encompasses communications between an attorney and his client's agent. Wigmore summarized that rule as follows:

> "*Communications from the client's agent.* The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege.
>
> "This of course includes communications through an *interpreter*, and also communications *through a messenger*, or any other *agent of transmission*, as well as communications *originating with the client's agent*

* Indeed, insofar as we can determine no court has ever questioned the applicability of the attorney-client privilege to communications between corporate clients and their attorneys, other than the District Court in the *Radiant Burners* case. The Seventh Circuit there, sitting *en banc*, reversed, pointing out that there is a "right and absolute necessity for confidential disclosure of information by a client to its attorney to gain the legal advice sought thereby", and went on to say:

> "A corporation is entitled to the same treatment as any other 'client'—no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure; absent its waiver thereof." (320 F.2d at 324).

and made to the attorney." (8 Wigmore, *Evidence*, § 2317 (McNaughton's Rev. 1961).) (Emphasis in original.)

Accord, 3 Jones, *The Law of Evidence*, § 831, at 1560 (Gard. Rev. 1958).

The decision of the Court of Appeals followed this traditional doctrine in determining the scope of the protection which the attorney-client privilege affords to communications between corporations and their attorneys. The Court of Appeals recognized that the public interest considerations which are the basis of the attorney-client privilege are fully applicable to communications between a corporation's attorney and *any* employee of the corporation who is providing information which will enable the attorney to give legal advice to, or perform legal services for, the corporation on whose behalf the employee acted. And this is equally so whether or not the employee happens to be a member of the corporation's "control group", and whether the attorney gives legal advice to the corporation directly through that employee or through one of its other agents.

Judge Decker, however, ignored the established rule that the privilege encompasses communications between an attorney and his client's agent, and held that, for purposes of applying the attorney-client privilege, a corporation is a "client" only with respect to communications between its attorney and members of the corporation's "control group". Under this test, the confidentiality of the attorney's communications with the corporation's other employees would not be protected, even though their actions are binding on, and their knowledge is attributable to, the corporation.*

* The "control group" test as phrased may be read as limiting application of the privilege only to those situations where the communication relates to the giving or seeking of legal advice,

(continued on p. 19)

Adoption of the "control group" test would emasculate the attorney-client privilege for corporate clients, and thus would deprive the public of the benefits which it receives when a corporation's policies and procedures are based on well-informed legal advice.* In order for the privilege to be effective, it must—and does—apply both (1) to the confidential communications whereby the client (or his agent) transmits to the attorney the relevant information upon which the attorney's legal advice or legal services necessarily will be predicated, and (2) to the confidential communications whereby the attorney transmits legal advice to his client (or to the client's agent). Under the "control group" test, however, the benefits of the privilege would in most situations be unavailable to corporate clients.

(footnote continued from p. 18)

and not where it is incident to an attorney's efforts to obtain facts which he needs to perform legal services (such as preparing for, or conducting, a trial) for his corporate client. But the law is well settled that the attorney-client privilege is not so limited and encompasses communications induced by *any* aspect of the attorney-client relationship (including the performance of legal services), and not merely requests for legal advice. *E.g., Uniform Rules of Evidence*, Rule 26; *Model Code of Evidence*, Rule 210(b); *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950), quoted in *Colton* v. *United States*, 306 F.2d 633, 637 (2d Cir. 1962).

As far back as 1826, this Court through Mr. Justice Story (*Chirac* v. *Reinicker*, 11 Wheat. 280, 294, supra, p. 16), and again in *Alexander* v. *United States*, 138 U.S. 353, 358 in 1891, declared that "whatever facts, therefore, are communicated by a client to a counsel, *solely on account of that relation*, such counsel are not at liberty, even if they wish, to disclose • • •." (Emphasis supplied).

* Plaintiffs have made no effort to deny this, or to explain why the public interest factors which are the basis of the attorney-client privilege do not apply with equal force whatever the rank of the corporate employee with whom the corporation's attorney is communicating.

In the first place, no attorney can give sound legal advice to, or provide adequate legal service for, his client without full knowledge of the relevant facts. And in the case of a corporation the relevant facts frequently—and usually—are known directly *only* to agents and employees of the corporation who are *not* members of the corporation's "control group".

Secondly, the corporate agents and employees whose activities will be affected most directly by legal advice frequently are not members of the "control group" (*e.g.*, salesmen); the effectiveness of legal advice affecting the future conduct of such persons (and thus of the corporation) manifestly will be diluted if the corporation's attorney cannot communicate with them directly and on a confidential basis.

1. "There has been general agreement that the purpose of the [attorney-client] privilege is to facilitate the administration of justice by encouraging full disclosure by the client to its attorney" (*Radiant Burners*, 320 F.2d at 322).* Courts and commentators long have recognized that the attorney-client privilege operates to encourage "freedom of consultation" by removing "the apprehension of compelled disclosure by the legal advisers" (8 Wigmore, *Evidence*, § 2291 (McNaughton's Rev. 1961)).** The "control

* This Court recognized that principle in *Blackburn* v. *Crawfords*, 3 Wall. (70 U.S.) 175, 192-193 (1865), when it quoted approvingly the following statement from an early English case:

"'• • • If the [attorney-client] privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case.'"

** In *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888), this Court had declared that the attorney-client privilege

(continued on p. 21)

group" test, however, would *stimulate* that "apprehension", by imposing severe limitations on the ability of a corporation's attorney to obtain information from corporate agents and employees without fear of disclosure. Consequently, if that test becomes the law, there will no longer be "freedom of consultation" or full disclosure to corporate attorneys.

The inevitable result will be that a corporation's attorney frequently will be forced to operate in darkness, or at best in shadow. He naturally will be reluctant to elicit relevant information (which might materially affect his opinion and his advice) from those of his client's employees who have first-hand (rather than hearsay) knowledge thereof, lest he be compelled to disclose to an adversary the information which he has thus acquired—perhaps even as an unwilling witness against his own client. Surely if it is in the public interest that a client be permitted to communicate confidentially to his attorney the information upon which the attorney's legal service or legal advice is to be predicated, then it is in the public interest that a corporation's attorney be permitted to obtain that information on a confidential basis from those of his client's agents and employees who are best able to furnish it to him accurately and completely. To permit confidential disclosure only for top level corporate executives, who seldom will have direct, first-hand knowledge of the relevant facts, would be of little use.

(footnote continued from p. 20)

"• • • is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."

To the same effect, see American Law Institute, *Model Code of Evidence*, Comment a to Rule 210, pp. 146-147.

A corporation, of course, is liable for the conduct of all of its agents and employees acting within the scope of their employment, even though few of them have the power to determine what action the corporation should take on the basis of its lawyer's advice. The "control group" test, however, produces the incongruous, and indeed absurd, result that subordinate corporate employees for whose conduct the corporation is liable, and whose knowledge is imputed to the corporation, cannot speak confidentially when they wish to inform the corporation's attorney about acts which they performed or information which they obtained while acting on the corporation's behalf.

If a corporate employee could not communicate with the corporation's attorney confidentially, would he freely disclose *all* relevant facts within his knowledge, including potentially unfavorable facts regarding conduct for which he and his employer may be jointly liable? One commentator has expressed his concern in the following graphic language:

> "* * * I stumble in bewilderment over reasoning that holds *every* employee of a corporation to be *the* corporation for the purpose of charging it with his knowledge, while it holds *no* employee, however important, except those in ultimate command, to be the corporation for purposes of the lawyer-client privilege. I marvel at reasoning which uses discovery processes as a means of compelling a defendant through its attorneys to cross-examine its own employees in order to prepare a case for the plaintiff, or requires counsel for a client, threatened with suit or sued, to avoid finding out what the case is about for fear of being converted into an informer against his client. * * *" (Lasky, *Lawyer-Client Privilege*, 1963 Journal of the State Bar of California 427, 442 (emphasis in original).)

Yet another inherent flaw in this aspect of the "control group" test should be noted: as a corporation's legal problem becomes bigger and more serious, the protection afforded to the corporation by the attorney-client privilege becomes narrower and less available. For example, in the event of a major criminal antitrust case, it might be that only members of the corporation's board of directors would have sufficient authority over the corporation's course of action to qualify as members of the "control group". Consequently, because of the very significance of such litigation to the corporation, its attorney would be unable to communicate on a confidential basis with the corporate agents or employees whose alleged conduct gave rise to the litigation (including even high-ranking corporate executives); he would be able to communicate confidentially *only* with "control group" members, who might not have first-hand knowledge of any of the relevant information needed by the attorney.*

Under such circumstances, the attorney would be forced to select between two almost equally unattractive courses of action: (1) to give his client legal advice, or perform legal services, without knowledge of many of the relevant facts, or (2) to obtain all of the relevant facts by interrogating his client's employees, knowing that he might be compelled to testify against his client about the details and the results of that interrogation (including even the questions which he asked the employees, as well as their re-

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* The absurdity of such a result was recently pointed out by Dean Pye of the Duke University School of Law (Pye, *Fundamentals Of The Attorney-Client Privilege*, The Practical Lawyer, November, 1969, p. 15, at pp. 19-20):

"Thus, in a matter of overwhelming importance to a corporation, a department or division head might not be able to

(continued on p. 24)

sponses to those questions). But surely if the attorney-client privilege is to serve the same purposes and provide the same benefits whether the client is an individual or a corporation, then an attorney for a corporation should be permitted to obtain relevant facts on a confidential basis from whatever person within the corporation—be he officer, salesman or office boy—has first-hand knowledge of those facts.

2. An equally important aspect of the attorney-client privilege enables the attorney to communicate legal advice to his client on a confidential basis; see 8 Wigmore, *Evidence*, § 2320 (McNaughton's Rev. 1961). In order to be most effective, legal advice must be given directly to those persons whose conduct may be affected or influenced by that advice. The ability of a corporate attorney to give

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(footnote continued from p. 23)

speak for the corporation, while in cases where an employee is actually authorized to make a decision after consultation with counsel—as, for example, the head of a claims department dealing with a minor personal injury claim—a communication to an attorney concerning the matter would be privileged as to the corporation.

• • •

"It has been pointed out that the adoption of such a ['control group'] test may mean that outside counsel who engages in internal investigations as a part of a vigorous program of antitrust compliance may be developing evidence against a client when he exchanges communications with corporate agents who are not within the control group.

"Furthermore, the test seems to deny the privilege to the corporation when the communication is made by middle-management executives who may not qualify for inclusion in the control group, but who have responsibilities for making recommendations that are frequently ratified perfunctorily by higher management. See Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352, 367-69 (1967)."

legal advice to members of the corporation's "control group" is of little value to the corporation—or to the public—if that attorney cannot also present his advice, on a confidential basis, *directly* to those agents and employees of the corporation whose duties are such that they might, if uninformed, violate some complex statute or rule of law, and who thus are in a position to benefit the most from that advice.*

For example, the Robinson-Patman Act is an exceptionally complicated statute which virtually defies comprehension even by experienced antitrust lawyers. Violations of the Robinson-Patman Act, however, generally are committed by relatively low-ranking sales personnel. These are the corporate employees who are most in need of advice from counsel on the technicalities and intricacies of that law. This is the very group of employees, however, that would be precluded by the "control group" test from receiving such advice in confidence.

Consider the situation of the attorney who feels that certain aspects of the activities of his corporate client are probably within the law and defensible as such, but that resolution of the question is not entirely free from doubt. He may wish to recommend procedures which he believes would strengthen the corporation's position, and to explain those procedures to the corporate employees responsible for their implementation. One writer has described the dilemma which the attorney would face if he could not advise his corporate client on a confidential basis under such circumstances:

> "* * * Take the case of the corporate attorney asked to advise his client, a manufacturing corporation, on

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* Under the "control group" test, a member of a corporation's "control group" logically could not communicate the attorney's advice to a non-member without waiving the privilege.

the legality of a marketing arrangement with the corporation's distributors. In his role as advisor the lawyer may tell his client that the proposed arrangement raises several questions not heretofore resolved, and that there is a distinct likelihood that the arrangement could ultimately be held to violate a federal statute or perhaps a previously entered order or decree. The corporation may nonetheless decide to undertake the program, and this may be a perfectly proper decision. If the matter is subsequently litigated * * * the lawyer, as an advocate, will be responsible for presenting the strongest possible case for the legality of the contested arrangement. But what of his prior advice?

"If the privilege is unavailable to his client the lawyer will be aware of these possibilities when he originally is called upon to render advice. What is he to do? His rendition of accurate but undesired advice will compromise the position that, as the advocate, he may be called upon to defend. In these circumstances it would be unrealistic to discount the likelihood that the advocate will prevail over the advisor. The resultant caution with which the lawyer advises his client may mislead the client into thinking his proposed action is lawful when in fact it is not, or may not be. It may induce him to undertake a program from which he would have been dissuaded had he been clearly warned of the legal dangers. To the extent that the privilege encourages more forthright advice by lawyers it reduces the possibility of such misled clients and encourages adherence to the law." (Miller, *The Challenges to the Attorney-Client Privilege*, 49 Va. L.Rev. 262, 269-270 (1963).)

The public, of course, has a vital interest in the deterrent effect of soundly based legal advice, particularly with respect to complex legal issues of the kind which frequently concern corporations; *e.g.*, compliance with the securities laws, the income tax laws and the antitrust laws. Enforcement of such statutes would be impossible without the suc-

cessful efforts of the Bar to explain, advise about and encourage voluntary compliance with the law.* Such free intercourse between attorney and corporate client should not be discouraged, as it would be if the protection afforded by the attorney-client privilege were restricted by adoption of the "control group" test.

It is a significant fact that the laws of other nations, so far as we have been able to ascertain from a representative sampling,** uniformly recognize the attorney-client privilege and apply it generally to an attorney's communications with any employee of his corporate client, regardless of the employee's rank. In those countries the confidentiality of a client's communications with an attorney is protected by statute, rule, or canon of ethics, which speak generally of "the client" without further definition or limitation of that term (except in Nationalist China, where application of the privilege to *any* attorney-client communication depends upon the discretion of the individual judge). The courts in England and Canada (as will be demonstrated *infra,* p. 36) have, like the courts in the United States, long applied the privilege to protect the confidentiality of an attorney's communications with any employee of his corporate client, without any restriction similar to the "control group" test. Inquiries were addressed to counsel in each of the other nations sampled, and in each instance:

1. Counsel expressed the opinion that in his country the privilege protects the confidentiality of an attor-

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* See, *e.g.,* Rifkind, *Access to Client and Adversary—A Plea,* 22 Record of New York City Bar Association 566, 567-568 (1967).

** We have received information from learned counsel concerning the laws of Australia, Belgium, China (Taiwan), France, Germany, Israel, Italy, Japan, Mexico, Netherlands, Sweden, Switzerland and Venezuela. English and Canadian cases are considered specifically *infra,* p. 36.

ney's communications with *any* employee of his corporate client, in exactly the same manner that it protects the confidentiality of an attorney's communications with an individual client; and

2. Counsel knew of no case or ruling questioning the applicability of the privilege to an attorney's communications with *any* employee of his corporate client.*

This understanding in common law, civil law, and other countries—as well as in the United States, as we show below—reflects a general belief that application of the attorney-client privilege to corporate employees (as well as to corporate executives) represents a salutary public policy. That policy should not be undermined by adoption of the "control group" test.

B. The Decision of the Court of Appeals Is In Accord With the Overwhelming Weight of Authority.

Despite plaintiffs' efforts to convey the contrary impression, the overwhelming weight of authority supports the decision of the Court of Appeals rejecting the "control group" test—a test unknown to any court until about eight years ago, when it was devised by Judge Kirkpatrick in one of the so-called "electrical equipment cases", *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa., 1962), petition for mandamus denied *sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir. 1962), *cert. den.* 372 U.S. 943 (1963).

Indeed, for more than 100 years courts in this country and in England uniformly have applied the attorney-client privilege to protect the confidentiality of communications

* Copies of the letters and memoranda submitted by foreign counsel have been lodged with the Clerk of this Court and are available for examination by plaintiffs' counsel.

between a corporation's attorney and *all* of its employees, so long as those communications occurred in connection with the seeking of legal advice by, or the furnishing of legal services to, the corporation. Those decisions reflect the well-settled rule, described by Dean Wigmore (*supra*, pp. 17-18), that the attorney-client privilege protects communications between an agent and his principal's attorney. To the same effect, see 5 Jones, *Commentaries on Evidence* 4136 (1926), which states that the privilege unquestionably applies "where an agent of the client communicates directly with the attorney with regard to the transaction as to which the attorney is employed * * * *".* Similarly, the American Law Institute's *Model Code of Evidence* (1942), in Rule 210(c)(ii), and the Uniform Rules of Evidence (approved by the Commissioners on Uniform State Laws and the American Bar Association in 1953), in Rule 26(3), provide that the privilege covers communications between the lawyer and "a representative of the client" or "an authorized representative", without other limitation.

Numerous federal and state courts have applied this rule to permit an attorney for a corporation to communicate on a confidential basis with the corporation's employees, without any suggestion that the applicability of the privilege depends upon the duties and responsibilites of the employees in question, or upon whether they happen to be members of the corporation's "control group".

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* The most recent edition of that work is in substance the same (3 Jones, *The Law of Evidence*, § 831, at 1560 (Gard Rev. 1958)). See also *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 Northwestern U. L. Rev. 235, 241 (1961) ("It has long been recognized that the [attorney-client] privilege fully applies where the communication originated with an agent of the client").

Thus in *United States v. United Shoe Machinery Corporation*, 89 F.Supp. 357, 359 (D.Mass. 1950), Judge Wyzanski stated:

> "• • • in so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, information furnished by an officer or *employee* of the [corporate] defendant in confidence and without the presence of third persons." (Emphasis supplied.)

Similarly, in *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 795 (D.Del. 1954), Chief Judge Leahy stated that the attorney-client privilege applies where

> "• • • the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either an opinion on law, or legal services or assistance in some legal proceeding.
>
> "In this case, the corporation is the client. 'Strangers' are those not affiliated with the corporation as *employees*, officers, directors, or 'outside counsel'. • • •" (Emphasis supplied.)

Judge Leahy did not suggest that "employee" was to have any meaning in this context other than its normal one; only *strangers to the corporation* were to be precluded from communicating with the corporation's attorney on a confidential basis.

Numerous other federal cases also have held that the attorney-client privilege protects the confidentiality of communications between a corporation's attorney and employees of the corporation, without any suggestion that the employees must be members of the corporation's "control group". See, for example, *Paper Converting Machine Co. v. F.M.C. Corporation*, 215 F.Supp. 249, 251 (E.D. Wisc.

1963) ("correspondence • • • from an employee of the [corporate] defendant to Mr. Hoffmeister [its attorney], seeking legal advice"); *United States v. American Radiator & Standard Sanitary Corp.*, 1958 Trade Cases ¶ 68,954 (W.D. Pa. 1958) ("compilation of data prepared by the [corporate] client for counsel for the ultimate purpose of gaining a legal opinion", and contained in a letter from the corporation's "Manager of Product Lines" to the corporation's attorney); *Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964) (attorneys who represented corporations and "certain employees and executives" thereof prepared memoranda summarizing the "debriefing" of those persons following their grand jury testimony, and the memoranda subsequently were exchanged among counsel for the different parties); *United States* v. *Aluminum Company of America*, 193 F.Supp. 251, 253 (N.D. N.Y. 1960) (communication between "non-legal personnel" of a corporation, disclosing legal advice previously given to the corporation); *United States* v. *Becton Dickinson & Company*, 212 F.Supp. 92, 93 (D.N.J. 1962) ("'writings between an attorney and an officer, director, employee, representative, or other attorney of the defendant corporation'").

Numerous state courts also have applied the attorney-client privilege to protect the confidentiality of communications between an agent acting on behalf of a corporate principal and the attorney for the corporation, without any suggestion that the privilege might be inapplicable where the communications involve employees of a corporation who are not members of its "control group". For example, in *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107 Atl.2d 527, 528 (1954), the court said:

> "• • • Since a corporation can only act through its agent, it must necessarily follow that if the attorney-client privilege is to extend to corporations, as it does,

> Russell v. Second National Bank of Paterson, 136 N.J.L. 270, 55 A.2d 241 (E. & A. 1947), it must necessarily extend to confidential communications made by the agent of the corporation. * * *"

To the same effect, see *Beach* v. *Oil Transfer Corporation*, 23 N.Y. Misc. 47, 199 N.Y.S.2d 74, 77 (Sup. Ct., Kings County, 1960) ("communications had between the [corporate] defendant, by its officers, employees or agents, and the defendant's attorneys"); *Fire Association of Philadelphia* v. *Flemming*, 78 Ga. 733, 3 S.E. 420 (1887) (communications between an insurance company adjuster and the company's attorney); *Brink* v. *Multnomah County*, 244 Ore. 507, 356 P.2d 536, 540 (1960) (communications between defendant's attorney and an appraiser who had been employed by defendant to observe property in question); *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 220 Atl.2d 751, 755 (1966) ("appraisals and reports thereof confidentially made for the State at the request of an attorney from whom the State is seeking legal advice and confidentially communicated or turned over to the attorney").

Particularly pertinent here is *D. I. Chadbourne, Inc.* v. *Superior Court*, 60 Cal.2d 723, 736-737, 36 Cal. Rptr. 468, 477, 388 P.2d 700, 709-710 (1964), where the "control group" test was rejected by the Supreme Court of California, the only court of last resort which has given full consideration to the problem. The California Supreme Court, after expressing its awareness of the conflicting federal decisions on the subject (see 388 P.2d at 706), set forth in detail the basic principles which govern the application of the attorney-client privilege to corporate clients. Its conclusion was substantially identical to that which the Seventh Circuit, citing *Chadbourne*, subsequently adopted in this case (App. 63). In view of the completeness with which the *Chadbourne* opinion covers the subject, we set forth the perti-

nent portion of that opinion in full (388 P.2d at 709-710):

"* * * If we apply to corporations the same reasoning as has been applied in regard to natural persons in reference to privilege, and if we adapt those rules to fit the corporate concept, certain principles emerge clear. These basic principles may be stated as follows:

"1. When the employee of a defendant corporation is also a defendant in his own right (or *is a person who may be charged with liability*), his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist;

"2. When such an employee is not a co-defendant (or person who may be charged with liability), his communication should not be so privileged unless, under all of the circumstances of the case, he is the natural person to be speaking for the corporation; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates from the corporation (as distinct from the nonlitigant employee), and *the communicating employee is such a person who would ordinarily be utilized for communication to the corporation's attorney;*

"3. When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter his status or make his statement subject to the attorney-client privilege;

"4. Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer;

"5. If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, *if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged;* • • • (Emphasis supplied.)•

Many other state courts also have held that the attorney-client privilege applies to preserve the confidentiality of a communication between a corporate employee (not a member of the corporation's "control group") and another employee or agent of the same corporation who in turn transmitted the communication directly to the corporation's attorney, in connection with securing of legal advice by the corporation. For example, in *Schmitt* v. *Emery*, 211 Minn.

• *Accord, Golminas* v. *Fred Teitelbaum Construction Co.*, 112 Ill. App.2d 445, 449-450, 251 N.E.2d 314, 318 (Ill. App. Ct. 1st Dist. 1969):

"• • • For example, the principle underlying the attorney-client privilege would demand that an employee's communications *should be privileged when* [as in the instant case] *the employee of the defendant corporation is also a defendant or is a person who may be charged with liability* and makes statements regarding facts with which he or his employer may be charged, which statements are given or delivered to the attorney who represents *either* or both of them." (Emphasis supplied.)

Contra, Day v. *Illinois Power Co.*, 50 Ill. App.2d 52, 199 N.E.2d 802 (Ill. App. Ct. 5th Dist. 1964).

547, 2 N.W.2d 413, 416 (1942) (involving an accident report which a bus driver submitted to his corporate employer at the request, and for the use, of the corporation's attorneys), the court said:

> "Because it is so often necessary for clients to communicate with their attorneys with the assistance or through the agency of others, as well as by their own personal action, *the privilege extends to a communication prepared by an agent or employee, whether it is transmitted directly to the attorney by the client or his agent or employee.* Of course the privilege is limited to the necessities of the situation. When a document is prepared by an agent or employee by direction of the employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, *such document is in effect a communication between attorney and client. The client is entitled to the same privilege with respect to such a communication as one prepared by himself.*" (Emphasis supplied.)

To the same effect, see *Jessup* v. *Superior Court,* 151 Cal. App. 102, 311 P.2d 177, 180, 182-183 (1957) (employees of City Department of Public Service); *Holm v. Superior Court,* 42 Cal.2d 500, 267 P.2d 1025 (1954) (bus driver); *Atlas Heating & Ventilating Co.* v. *Superior Court,* 208 Cal. App. 769, 25 Cal. Reptr. 532 (1962) (driver of corporate vehicle); *In re Hyde,* 149 Ohio 407, 79 N.E.2d 224, 227 (1948) (bus drivers); *Robertson* v. *Commonwealth,* 181 Va. 520, 25 S.E.2d 352, 360 (1943) (streetcar operator); *Wise* v. *Western Union Telegraph Co.,* 36 Del. 456, 178 Atl. 640, 642 (1935) (employee of telegraph company's local office); *Atlantic Coast Line R. Co.* v. *Williams,* 21 Ga. App. 453, 94 S.E. 584, 586 (1917) (train conductor); *Ex parte Schoepf,* 74 Ohio 1, 77 N.E. 276 (1906) (conductor and motorman of street railroad); *Davenport Co.* v. *Pennsylvania R. Co.,* 166 Pa. 480, 31 Atl. 245 (1895) (railroad's local freight agent).

The English courts have long followed the same principles. For example, in *Wilson* v. *Northampton and Banbury Junction Ry. Co.*, 14 Equity Cases 477 (1872), the court held that the attorney-client privilege protected the confidentiality of correspondence (1) between the company's attorneys and the former engineer of the company, and (2) between the company's attorneys and the "agents, subagents, engineers, surveyors, and directors of the company". See also *Birmingham and Midland Motor Omnibus Company, Limited* v. *London and North Western Railway Company*, 3 King's Bench Division 850, 851 (Court of Appeal, 1913) ("reports by porters and other agents and employees" of the defendant railroad corporation); *Seabrook* v. *British Transport Commission*, 2 All England Law Reports 15, 17 (Queen's Bench Division, 1959) ("reports made by the [corporate] defendants' officers and servants") and cases there cited. The basic principle that the attorney-client privilege protects communications "had through the medium of an agent, as far as it would extend to them if had with the principal", was enunciated in *Russell* v. *Jackson*, 68 Eng. Rep. 558-559 (1851) (involving the agent of an individual, rather than of a corporation). Canadian cases to the same effect are *Montreal Street Railway* v. *Feigleman* [Quebec K. B., 1913] 7 D.L.R. 6 (report prepared by motorman and conductor of streetcar for transmittal to the streetcar company's attorneys); *Stephenson* v. *E. D. & B. C. Railway* [Alberta S. Ct., 1926] 2 D.L.R. 680 (reports prepared by railroad claim agents, and "a report which all employees of the Defendant * * * make immediately after an accident [in part] for the information of the Company's Solicitor for his advice thereon").

Despite plaintiffs' efforts to suggest that the "control group" test has been widely adopted, they are able to cite very few decisions wherein that test has been applied. Moreover, none of the cited opinions contains a reasoned analysis justifying adoption of the "control group" test, and none

reflects an understanding of the far-reaching consequences which inevitably would result if such a severe restriction were imposed on the protection which the attorney-client privilege affords to communications between corporations and their attorneys.

As indicated *supra*, the "control group" test was devised by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483, *supra*, p. 28.* Significantly, that case (unlike the instant litigation) involved the applicability of the attorney-client privilege to communications between an employee of a corporation and a corporation's attorney who had expressly advised the employee that his interests might well conflict with the corporation's interests. According to Judge Kirkpatrick's opinion, the attorney told the employee that "although his [the employee's] disclosures were 'privileged', if it should turn out that they revealed a violation of written company policy directives, the lawyer would 'report that fact to management'" (210 F.Supp. at 484). Judge Kirkpatrick concluded that those statements by the attorney had the effect of "sharply differentiating the witness from 'the management', meaning, of course, the corporation" (at p. 486), and thereby effectively precluded "any possible claim that the communications were confidential" (at p. 484). Judge Kirkpatrick held, because of those statements by the attorney, that neither the attorney nor the employee regarded the communications as confidential, and also that both the attorney and the employee had understood that the employee was separate and distinct from the corporate entity, and had acted accordingly (see 210 F.Supp. at 484, 486).

On the basis of those factors (which are not present here),

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* Plaintiffs also cite (Pl. Br., p. 24, n. 21) two other rulings which Judge Kirkpatrick made in the course of the same litigation. Those, of course, do not add to the authority of his original decision.

Judge Kirkpatrick concluded that the attorney-client privilege did not protect the confidentiality of the communications between the employee and the corporation's attorney. Then, generalizing far beyond what was required by the case before him, he announced the novel "control group" test. In doing so, he expressly noted his disagreement with Judge Wyzanski's decision (in the *United Shoe Machinery* case, *supra*, p. 30) that the attorney-client privilege applies to communications between a corporation's attorney and the employees of the corporation, without restriction. After asking the correct preliminary question—whether it was "the corporation which is seeking the lawyer's advice"—Judge Kirkpatrick concluded that that question could be answered affirmatively only where the corporate employee who communicated with the lawyer "is in a position to control or * * * take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney" (210 F.Supp. at 485). Judge Kirkpatrick gave no further explanation, and did not manifest any awareness of the effect of excluding from the privilege communications between the corporation's attorney and employees who do not control the decisions as to what the corporation will do on the basis of the attorney's advice. He seemingly did not recognize that the "control group" test which he was initiating would in most situations render the privilege unavailable to corporations, nor did he suggest why such a result might be in the public interest.

An individual client who consults his attorney for legal advice, of course, necessarily has knowledge of the relevant facts regarding his own conduct, and also is in a position to receive the attorney's advice and decide what action he will then take. Under the "control group" test, however, a corporate client would be protected by the attorney-client privilege only with respect to communications between its attorney and an employee who possessed *all* of those characteristics of an individual client. But, as we have dem-

onstrated in greater detail in Section I A, *supra,* those corporate employees who have first-hand knowledge of the relevant facts, and who are best able to communicate those facts accurately to the corporation's attorney, usually are *not* the same corporate employees who are responsible for seeking and obtaining legal advice from the corporation's attorney, and for determining what action the corporation should take on the basis of that advice. The result is, as one writer stated succinctly, that Judge Kirkpatrick, by adopting the "control group" test, "proceeded to carve the attorney-corporate client privilege almost into oblivion." (Willis, *The Inroads of Pre-Trial Discovery on the Attorney-Client Privilege,* 1966 N.Y. State Bar Association Antitrust Law Symposium 109, 122.)

The other three reported federal decisions applying the "control group" test also do not offer any rationale in support of that test, and do not discuss the inevitable adverse effects of its adoption. In *Natta* v. *Hogan,* 392 F.2d 686, 692 (10th Cir., 1968) and *Garrison* v. *General Motors Corp.,* 213 F.Supp. 515, 518 (S.D. Cal., 1963), the courts simply quoted from Judge Kirkpatrick's *City of Philadelphia* decision as though it were conclusive. Moreover, in those cases and in *Honeywell, Inc.* v. *Piper Aircraft Corp.,* 1970 CCH Trade Cases ¶ 73, 122 (M.D. Pa., 1970), the only other reported "control group" case cited by plaintiffs, the courts did not refer to, and apparently were not aware of, any of the numerous contrary authorities (which were not discussed in the parties' briefs).*

The reason why those courts made no effort to justify the "control group" test is readily apparent from a review

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* The court in *Honeywell* expressly acknowledged (without criticism) the test for applying the attorney-client privilege to corporate clients which the Seventh Circuit had recently adopted in the instant case, but pointed out that the party claiming privilege in the case before it had not satisfied the requirements of the Seventh Circuit's test.

of the briefs submitted to them. In each instance the corporate party did not contest the validity of the "control group" test, or present any authorities or reasons demonstrating why that test is unsound; instead, the corporate party merely argued (unsuccessfully) that the particular communications in question were privileged because they involved members of the corporation's "control group". Thus in each of those cases the court was not asked to (and apparently did not) consider or determine whether the "control group" test was sound and reasonable as a matter of law. Those cases therefore are entitled to little weight as authority.*

Plaintiffs also rely (Pl. Br., pp. 24, 27, 28) on this Court's decision in *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). In *Hickman*, however, this Court specifically *declined* "to delineate the content and scope of the [attorney-client] privilege" (329 U.S. at 508), and held only that "the privilege does not extend to information which an attorney secures from a witness * * *" (329 U.S. at 508). Although some of the witnesses interviewed in *Hickman* were crew members employed by the attorney's client, there was no indication

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* In the reply brief which they filed in support of their petition for certiorari here, plaintiffs asserted (p. 1, n. 1) that the appellees in *Natta* (rather than the appellant corporation) "challenged the control group test". In *Natta*, however, the appellees sought to *narrow* the attorney-client privilege even beyond the limitations imposed by the "control group" test. They contended that the privilege does not apply to communications *from* an attorney to a client, and also that an especially broad exception to the attorney-client privilege should be recognized with respect to communications involving patent attorneys. It is clear, however, that none of the parties in *Natta* even suggested that, as the Seventh Circuit held in the instant case, the "control group" test unduly restricts the protection which the attorney-client privilege affords to communications between corporations and their attorneys.

that they had performed any duties on behalf of their employer in connection with the sinking of the vessel (329 U.S. at 498). Indeed, as survivors of the accident in question, they had presented claims of their own against the employer (No. 47, 1946 Term, Transcript of Record 70a). The opinion in *Hickman* does not suggest or even intimate that the Court meant to abrogate the privilege with respect to communications between a corporation's attorney and *all* corporate employees possessing relevant factual information who are not members of the corporation's "control group". Thus the decision of the Court of Appeals here is completely consistent with *Hickman*.

Plaintiffs also assert (Pl. Br., p. 11) that in *Rucker* v. *Wabash Railroad Co.*, 418 F.2d 146, 154 (7th Cir. 1969), "Another panel of the Seventh Circuit had previously indicated acceptance of a standard similar to the control group test." The *Rucker* opinion, however, expressly notes that "the statements [in question] do not appear to have been taken by the attorneys, but by investigators employed by the parties or their insurers" (418 F.2d at 154). Thus the defendant corporation in the *Rucker* case could not properly have claimed the protection afforded by the attorney-client privilege, and indeed its brief to the Court of Appeals did not even argue that the privilege was applicable, but only argued (unsuccessfully) that the statements in question constituted attorneys' work product. Moreover, the Seventh Circuit decided *Rucker* less than three months before it rejected the "control group" test in the instant case, and the opinion in *Rucker* was written by Judge Cummings, who was a member of the panel which entered the unanimous decision in the instant case.*

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* Other cases cited by plaintiffs are even less pertinent. For example, *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44 (S.D.N.Y.

(continued on p. 42)

Plaintiffs also rely (Pl. Br., p. 25, n. 23) on the Preliminary Draft of the Proposed Rules of Evidence, prepared by the Advisory Committee on Rules of Evidence, which seems to adopt a modified version of the "control group" test (Rule 5-03(a)(3)) (Advisory Committee Note, p. 80). But that Draft, of course, is only the tentative version which it purports to be, made without the benefit of the comments and criticisms which the Advisory Committee itself has solicited. Thus it is not possible to predict with certainty what recommendation ultimately will be presented by that Committee (which, of course, now has before it the Seventh Circuit's decision in this case). Moreover, whatever final form that recommendation may take will have to be approved by the Standing Committee on Rules of Practice and Procedure, by the Judicial Conference, and by this Court before it can become effective. What Rule 5-03 will then provide on this issue is entirely conjectural.

C. Plaintiffs Present No Arguments Which Justify Adoption of the "Control Group" Test Or Disclosure of the Communications Which Are At Issue Here.

1. As we have demonstrated, the decision of the Court of Appeals preserving the confidentiality of the 17 attorneys' memoranda at issue here was predicated solely on

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(footnote continued from p. 41)

1951) (Pl. Br., p. 21, n. 19), involved only claims of work product protection, and did not present any issues regarding the attorney-client privilege. The court there emphasized the fact that the record did not show that the witness statements in question were taken by the *defendant's attorney*, and concluded that there apparently was not "any basic professional relationship" between the defendant and the individual who procured the witness statements, even though that individual happened to be an attorney (14 F.R.D. at 467).

the conclusion that the "control group" test is unsound as a matter of law. Plaintiffs' brief, however, makes very little effort to defend that test, or to present any rationale which would warrant adoption of such a restrictive standard by this Court.

Although plaintiffs assert (Pl. Br., p. 23) that "the control group test strikes an appropriate balance between the interests sought to be protected by the attorney-corporate client privilege and the legitimate need of litigants to secure access to the facts," their brief makes no effort to balance the competing considerations, or to explain how the privilege impedes access to any facts. Indeed, plaintiffs merely state, contrary to what is obviously so, that the "control group" test "does not interfere with the ability of corporate attorneys to give legal advice to the corporation and its proper representatives in confidence" (Pl. Br., p. 37). But the "control group" test unquestionably narrows the number of corporate employees who may receive legal advice in confidence, and it also impairs the soundness of the legal advice given to a corporation by preventing the lawyer from communicating confidentially with non-"control group" members in order to obtain the relevant information upon which his advice may have to be predicated. In addition, plaintiffs disregard the fact that the attorney-client privilege encompasses not only the giving of legal advice, but also communications which are incident to the attorney's performance of legal services, including the handling of litigation (see *supra*, pp. 18-19 n.).

Plaintiffs also assert (Pl. Br., pp. 27-28) that an employee who is not a member of the "control group" is no different from an outside witness who has knowledge of relevant facts. But a corporate employee who obtains information in the course of his corporate duties, and for whose conduct the corporation is liable, clearly is an agent

of the corporate client to whom the privilege always has been held applicable (except in the few "control group" cases). Wigmore's recognition that the privilege covers an attorney's communications with his client's agents (*supra*, pp. 17-18) demonstrates that its application to corporate employees is fully consistent with the "four fundamental conditions" which Wigmore deemed a prerequisite to the existence of any privilege (as quoted at Pl. Br., pp. 22-23, from 8 Wigmore § 2285)—as it clearly is.

2. Plaintiffs' brief attempts to support Judge Decker's conclusion by challenging the wisdom of affording corporations the protection of the attorney-client privilege, which plaintiffs characterize as "an imposing barrier to the ascertainment of facts" and a means of "hobbling the judicial process" (Pl. Br., pp. 29, 35). But none of the "control group" cases, including Judge Decker's opinion here, espouses any such position, and, as we have shown *supra*, pp. 14-15, the privilege does not suppress the truth. It does not preclude a litigant from resorting to any source of information which would have been available if his adversary had not consulted an attorney. The practical result of holding the privilege inapplicable (where it had been thought to apply) would merely be to create another possible source of information—the lawyer—which source might not exist but for the privilege, since the client might not have communicated that information to the attorney if both had not believed that the privilege would preserve the confidentiality of their communication.

Furthermore, as we have demonstrated in Section I A, *supra*, the Anglo-American legal system has recognized consistently, for several hundred years, that the attorney-client privilege creates public benefits which exceed whatever inconvenience it may impose upon particular litigants. See American Law Institute, *Model Code of Evidence*

(1942), Comment to Rule 210, p. 147; 8 Wigmore, *Evidence* § 2291 (McNaughton's Rev. 1961).* If it is in the public interest to encourage full and free disclosure between client and attorney, such disclosure should be encouraged for corporate clients as well as for individuals.

3. Plaintiffs' repeated references to the needs of plaintiffs in private antitrust cases and to the alleged peculiarities of "debriefing" memoranda appear to imply that the privilege should be narrower in such situations. But none of the "control group" cases, including Judge Decker's opinion here, makes any such suggestion. Each of them treated the test as a general rule of evidence; indeed, three of the other four reported federal control group cases—*Natta*, *Garrison* and *Honeywell*, discussed at pp. 39-40, *supra* —were not antitrust cases and did not involve "debriefing memoranda".

Plaintiffs' intimation that the attorney-client privilege should be applied differently in private antitrust suits than in other types of litigation disregards the fundamental salutary purpose of the privilege—to encourage full and candid disclosure between clients and their attorneys, so that the latter may provide sound legal advice and compe-

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* Plaintiffs have cited only a single modern critic of the privilege, Professor Morgan; they say (Pl. Br., p. 36) that "no answer has ever been documented to Professor Morgan's challenge" to the basic validity of the attorney-client privilege. But the "challenge" in question appeared in Professor Morgan's foreword to the *Model Code of Evidence*, which (despite his views) expressly recognized that "the continued existence of the [attorney-client] privilege is justified on grounds of social policy." American Law Institute, *Model Code of Evidence* (1942), Comment to Rule 210, p. 147. Professor Morgan was unsuccessful in his efforts to convince courts, commentators and the Bar that the public interest would be served by abolition of the privilege.

tent legal service. If the privilege is to accomplish that purpose, both client and attorney must be able to determine, *at the time their communication occurs*, that the privilege is applicable, without fear that confidentiality will be dependent upon the kind of litigation in which disclosure might be sought in the future.

Plaintiffs' suggestion that the privilege should not apply to attorneys' "debriefing" interviews with grand jury witnesses, because in such situations attorneys are "little more than scriveners" (Pl. Br., p. 21, n. 19), has no basis either in fact or in law. As a matter of law the privilege covers attorney-client communications whether the client or the attorney is the scrivener (or even if no written record of the communication is made). A "debriefing" communication is in this respect the same as any other communication whereby a client (or the client's agent) attempts to inform an attorney of relevant facts upon which the attorney will predicate legal advice or legal services.*

Nothing in the record even suggests that the still-sealed attorneys' memoranda at issue here are "simple witness narratives" (Pl. Br., p. 17), or merely reiterate what the witnesses told the grand jury. Plaintiffs' brief itself acknowledges (pp. 18, 32) that "debriefing" communications frequently include relevant information in addition to a description of the grand jury testimony itself, and this would normally be the case (see *e.g.*, App. 97). Even if a particular "debriefing" communication related only to the grand jury testimony, however, the attorney needs such information in order to prepare for possible subsequent liti-

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* Whether or not an attorney's memorandum expressly incorporates the attorney's thought processes is relevant only in determining the applicability of the work product doctrine, which affords qualified, not absolute, protection to documents wherein an attorney describes his interviews with outside, non-client witnesses.

gation and to advise the client how to act in compliance with law. Clearly he will be better able to do this if the client and the client's agents discuss their grand jury appearances with the freedom and candor which can exist only if their communications will be kept confidential.

4. Plaintiffs' statements that disclosure of the attorneys' memoranda will be helpful to plaintiffs in these and similar law suits are, of course, true. Any litigant could appropriately argue that his trial preparation would be greatly facilitated by disclosure of confidential communications between his adversary and the adversary's attorney, but no court has suspended the attorney-client privilege on such grounds. This Court rejected a similar argument in *Hickman* v. *Taylor*, 329 U.S. at 507, admonishing that "framing the problem [of requested disclosure of attorneys' work product] in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory." As in *Hickman*, the problem here "far transcends the situation confronting this petitioner" and must be viewed "in light of the limitless situations" to which the test espoused by plaintiffs would apply (329 U.S. at 507).

5. The inherent weakness of plaintiffs' position is demonstrated by their repeated reliance upon statements made by or regarding other witnesses, many of which statements are not in the record or properly before this Court.

Thus plaintiffs refer repeatedly to Judge Decker's "findings of particularized need for release of the debriefing statements in this case" (Pl. Br., p. 31), and quote his comments about the evasive and forgetful deposition testimony of certain witnesses (Pl. Br., pp. 4-5, 31-32 n. 29). The "findings" (App. 19-20), however, related *only* to defendants' claims under the *work product doctrine*, and had no bearing on Judge Decker's decision regarding the

attorney-client privilege. Furthermore, the quoted statements by Judge Decker with respect to evasive deposition testimony related to motions for disclosure of the grand jury testimony of about 20 individuals, most of whom are not among the 17 persons whose communications with attorneys are at issue here.* Particularly improper in this respect is plaintiffs' reliance (Pl. Br., pp. 31-32, n. 29) on quotations from Judge Decker's opinion of January 16, 1970 (three months after the ruling here involved and not contained in the present record), which held that eight individuals had been evasive and recalcitrant at their depositions; not one of those eight individuals is the subject of any of the attorneys' memoranda now before this Court.

Similarly, plaintiffs quote at length (pp. 32-35) from four attorneys' memoranda summarizing interviews with Clarence Roland and Si Goldman, neither of whom is the subject of any of the 17 memoranda involved here. Furthermore, these four memoranda were under seal at the time of Judge Decker's ruling, and three remained under seal until after the decision of the Court of Appeals.** A copy of one of the two Roland memoranda was attached to the answer which plaintiffs submitted to the Court of Appeals in response to the petition for mandamus, but it was not

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* Disclosure of attorneys' communications with those individuals who were evasive at their depositions obviously is not necessary to show the substance of their grand jury testimony, inasmuch as their grand jury transcripts (which have already been turned over to plaintiffs) obviously are the best evidence of what that testimony was.

** Certain of the attorneys' memoranda which were at issue before Judge Decker were unsealed after the Court of Appeals denied mandamus with respect to Judge Decker's order directing their disclosure.

properly a part of the record in the Court of Appeals because it remained sealed at the time Judge Decker rendered his October 7, 1969 decision. It is because the Roland memoranda were not read by the District Court (App. 14, n. 11) and were not properly before the Court of Appeals that respondents are seeking to prevent their inclusion in the Appendix and in the record before this Court.* (Plaintiffs have made no effort to have the two Goldman memoranda which they quote included in the Appendix or in the record.)

In any event, there is no basis for plaintiffs' assertion that the contents of the four unprivileged memoranda relating to Messrs. Roland and Goldman exemplify the contents of the 17 *other* attorney-client communications which the Court of Appeals held privileged, and which plaintiffs have never seen. The Seventh Circuit, in refusing a request for disclosure of attorneys' work product, commented on the impropriety of such an argument in *Hauger* v. *Chicago, Rock Island & Pacific R. Co.*, 216 F.2d 501, 505-506 (7th Cir. 1954):

> "* * * In substance plaintiff argues that, inasmuch as it was revealed at the taking of depositions that three of the witnesses had given statements to Rock Island which were impeaching of their testimony on the depositions, a court would conclude that the testimony of the six witnesses whose statements are now being discussed also would be impeached by their respective statements, if produced for inspection. *This is equivalent to saying that where it was shown that three witnesses out of a group of nine lied, the other six must have also lied.* Obviously there is no reasonable basis for such a deduction. *If there is any presumption it is in favor of veracity rather than perjury.* * * *" (Emphasis supplied.)

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* This Court has reserved decision as to whether the Roland memoranda may be included in the Appendix and in the record.

6. Plaintiff's suggestion that the attorneys' memoranda, or the information contained therein, were exchanged among counsel for various defendants (Pl. Br., pp. 19, 26) is not supported by the record, and was not a basis for Judge Decker's ruling or even mentioned in his opinion. In any event, such an exchange would not have waived the privilege, as the Ninth Circuit squarely held in *Continental Oil Co.* v. *United States,* 330 F.2d 347 (9th Cir. 1964), a case which involved attorneys' "debriefing" memoranda quite similar to those which are involved here.*

Plaintiffs also contend that the attorney-client privilege should not be applicable here because the attorneys' affidavits and factual statements did not indicate that any of the corporate employees with whom they conferred "had sought or received legal advice", or "expected or requested that his disclosure be kept confidential" (Pl. Br., pp. 20-21).** But here we are concerned with the corporation's privilege, not the employee's. Because in each instance the corporation, not the individual employee, was the client, the

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* There is also nothing in the record or in Judge Decker's opinion to support plaintiffs' suggestion (Pl. Br., p. 19) that the privilege may have been waived as to a few of the memoranda because of the general rule that materials "used to refresh the recollection of a witness" must be made available to opposing counsel. That rule applies only to material used to refresh the recollection of a witness *while he is testifying,* rather than (as here) in preparation for his testimony—a fact which is demonstrated by *National Dairy Products Corp.* v. *United States,* 384 F.2d 457 (8th Cir. 1967), *cert. den.* 390 U. S. 957 (1968), the only case cited by plaintiffs on this point (Pl. Br., p. 19, n. 17).

** Although plaintiffs state expressly that Judge Decker found "that the grand jury witnesses neither sought nor received legal advice relating to corporate affairs during their debriefing interviews" (Pl. Br., p. 20), a careful perusal of Judge Decker's opinion fails to disclose such a statement.

determinative facts are (1) that the communications occurred in connection with the furnishing of legal service to the *corporation*, and (2) that the *corporation* contemplated that the employee's communications with the corporation's attorney would be confidential. Consequently, the absence of evidence regarding the employee's intentions in that respect is irrelevant.

Finally, plaintiffs' argument that the memoranda should be disclosed because they are likely to contain evidence prejudicial to defendants provides no sound basis for holding the privilege inapplicable. The attorney-client privilege applies fully and completely even to a client's admission of guilt to his attorney (no matter how horrible the crime of which he is guilty). 8 Wigmore, *Evidence*, § 2298 (McNaughton's Rev. 1961). A client must be permitted to communicate confidentially with his attorney, particularly as to such matters, if the privilege is to benefit the public interest by achieving its intended purpose.

II. THE GRANTING OF MANDAMUS WAS AN APPROPRIATE EXERCISE OF DISCRETION BY THE COURT OF APPEALS.

It is of course clear that not every wrongful exercise of discretion or every incorrect ruling on a legal question justifies the use of mandamus as a means of obtaining review of interlocutory orders. This does not mean, however, that there is a rigid rule against the use of the writ to review any such order. This Court has long recognized that in exceptional situations mandamus may properly issue "to confine an inferior court to a *lawful* exercise of its prescribed jurisdiction * * *." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109-110 (1964); *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953); *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 245 (1964); *Will* v. *United States*, 389

U.S. 90, 95 (1967), all quoting from *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943) (emphasis supplied). And the decisions further establish that whether a writ should issue is a discretionary matter. "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. * * *" *Ex parte Peru*, 318 U.S. 578, 584 (1943); *Roche* v. *Evaporated Milk Association, supra*, at 25; *Schlagenhauf, supra*, at p. 112 n.; *Ex parte United States*, 287 U.S. 241, 248 (1932). See also 6 Moore, *Federal Practice*, § 54.10[4], pp. 87-88.

"The courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction' * * *." *Will* v. *United States, supra.* The decisions establish that the writ may issue to correct errors of law on matters of exceptional importance where no other adequate remedy is available. Indeed, this Court has held that mandamus, on occasion, may issue even to correct a "clear abuse of discretion". *Schlagenhauf, supra*, at p. 111; *Bankers Life, supra*, at p. 383; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957).

Of course, as this Court also asserted in the *Will* case (p. 98 n.), the references in earlier decisions to "abuse of discretion" and "want of power" were not meant to result in review of interlocutory orders "on the *mere* ground that they may be erroneous" (emphasis supplied). More than that is required, and most interlocutory orders, erroneous or not, clearly remain unreviewable.

In determining whether this Court itself should issue a writ to a District Court, without intermediate review by a Court of Appeals—and the test should be more stringent in such cases than where the writ is sought from a Court of Appeals—this Court has asserted that "such power will be exercised only where a question of public importance is

involved * * * ." *Ex parte Peru,* 318 U.S. 578, 585, 586 (1943). When such a question is raised and there is reason to believe that the District Court's decision is *not* a lawful exercise of its authority, and when no other effective remedy is available, the writ may appropriately issue.

There can be no doubt as to the extraordinary importance of the question presented by Judge Decker's decision adopting the "control group" test. For, as we have shown in Section I A, *supra,* adoption of that test would nullify in substantial part the attorney-client privilege for corporate clients. So to destroy the confidentiality of the relationship between an attorney and his corporate clients (and their employees)—and we see no reason why the rationale of Judge Decker's decision does not extend equally to unincorporated business entities as well, except when only a single individual is involved—would substantially alter the manner in which law is practiced, to the detriment of the public, as well as the private, interests which the attorney-client privilege is designed to protect.

Rulings on evidence questions, particularly those which occur in the course of discovery, seldom reach the appellate courts through appeals from final judgments. Accordingly, if the writ had not been granted, Judge Decker's ruling would have operated as a warning to all careful counsel, particularly in the Seventh Circuit, thereby inhibiting free communication between corporate clients and their attorneys. Preparation for a vast amount of litigation, as well as factual inquiries in many contexts which might result in litigation, would have been affected.

An additional factor supports the granting of the writ in multi-district cases such as these. In this litigation Judge Decker is acting as pre-trial judge, pursuant to 28 U.S.C. § 1407, for over 40 cases filed in six different circuits and

in one district in the Seventh Circuit in addition to the Northern District of Illinois. Each of these cases, if not settled,* will be tried and appealable in the district and circuit in which it was initially filed. The possibility of conflicting rulings, and the need for retrials if *any* Court of Appeals were to disagree with Judge Decker, are manifest. In such circumstances, at least where there is substantial doubt as to correctness of a trial judge's ruling on an important question of law, sound judicial administration requires that the matter be determined authoritatively before the cases are sent back to the originating districts for trial. Moreover, since other discovery is still pending in these cases and trials are a long time away, the time required for the mandamus proceeding will not delay the ultimate disposition of the litigation.

The above considerations demonstrate that the question presented here is of infinitely greater importance than the issues in other cases where this Court has held mandamus to be appropriate. For here the Bar, the entire business community, and a large volume of litigation in which they are engaged will be affected.

In a number of cases this Court and the courts of appeals have granted mandamus to correct misinterpretations of statutes or rules when the circumstances made prompt correction of the error exceptionally important. *E.g.*, whether Civil Rule 35 permits a court to order a physical examination of a defendant as well as of a plaintiff (*Schlagenhauf, supra*); when masters can properly be used (*LaBuy* v. *Howes Leather Co. supra*); the "appropriate criteria" to be considered in applying 28 U.S.C. §. 1404(a) (*Platt, supra*); whether discovery depositions are proper in admi-

* A number have been settled since the Court of Appeals entered its decision.

ralty cases (*Miner* v. *Atlass*, 363 U.S. 641 (1960)); whether the attorney-client privilege protecting "debriefing" memoranda (similar to those here) had been waived by an exchange of the memoranda between counsel for different defendants (*Continental Oil Co.* v. *United States*, 330 F.2d 347, 349 (9th Cir. 1964), *supra*, pp. 31, 50); and whether disclosure of a trade secret could lawfully be compelled (*Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324 (9th Cir. 1961)). A number of the above cases held mandamus to be an appropriate remedy to deal with important legal problems arising during the course of discovery. *Schlagenhauf, Atlass, Continental Oil, Hartley Pen*, all *supra*.

There is no less reason for granting mandamus when a trial court threatens to emasculate a common law rule* which was universally accepted until 1962, and which only a handful of courts have failed to follow since that date. The impact of the "control group" test upon the public interest in enabling attorneys to provide legal service on the basis of candid disclosure of the relevant facts is far more pervasive and significant than the impact of the issues which were deemed sufficient to warrant the use of mandamus in the above cases.

Nor was any other effective remedy available to defendants with respect to the trial court's ruling. The trial court had barred other avenues of appellate relief by refusing certification under 28 U.S.C. § 1292(b), and by refusing requests by certain defense counsel (*e.g.*, App. 98) that the attorneys' memoranda be returned to them (which would

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* That common law and court rules may be similar in nature and importance is shown by the fact that the common law rules of evidence probably will soon become the subject of federal court rules.

have enabled counsel to challenge the propriety of the trial court's order through contempt proceedings, if they had chosen to do so). Thus if the Court of Appeals had not issued its writ of mandamus, the privileged documents would have been turned over to the plaintiffs immediately, and the privilege would have been lost irretrievably. As a practical matter, such an error cannot be rectified years after the confidential information has been disclosed, even if a reviewing court finally determines, after trial, that the documents were privileged.

Plaintiffs point to statements in the *Will* and *Schlagenhauf* opinions, *inter alia*, which refer to "usurpation of power" by the trial judge as a prerequisite to the issuance of the writ. But the cases in which mandamus has been granted show that that phrase does not connote anything like an arbitrary or bad faith assertion of non-existent power by the trial court. Nothing like that was present in any of the cases. Thus, in *Ex parte Peru*, 318 U.S. at 588, in which this Court issued its writ directly to the District Court, Chief Justice Stone stated that "the question which we must decide is not whether there was jurisdiction in the district court * * * but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law." In the *Platt*, *Schlagenhauf*, and *Atlass* cases, there was also nothing more than a good faith misinterpretation of a rule or statute, no different in substance from the misinterpretation of a rule of evidence which is involved here. In each instance, although the trial court had jurisdiction over the controversy, it lacked "power", in one sense of that term, to enter an order contrary to what the Court of Appeals determined to be the correct principle of law.

To allow writs to issue in the rare cases of this sort does not undermine the general policy against piecemeal appeals. Congress reincorporated both the final judgment rule and the All-Writs section in the Judicial Code of 1948,* long after the latter had been construed (as in the *Peru* case) to allow the courts a safety valve for dealing with exceptional situations more speedily than the final judgment rule alone would permit. It therefore cannot be said that the action of Congress is inconsistent with such an interpretation of the two statutory provisions together.

Nor did Congress repeal the All-Writs statute, or express any dissatisfaction with the way that statute had been construed, when it created another exception to the finality principle by passing 28 U.S.C. § 1292(b), 72 Stat. 1770, in 1958. That section allows an interlocutory appeal only when both a district court and a court of appeals concur in finding that the law is in doubt and that immediate appeal will expedite the litigation. This is a much broader test than the courts have applied in issuing writs of mandamus, for it is not restricted to "exceptional circumstances". On the other hand, Section 1292(b) does not apply in situations where a district court refuses to certify a question which from the public as well as the private standpoint demands immediate decision. The cases in which writs have been granted attest that there are such situations, and that a trial judge should not have *conclusive* authority to determine whether an immediate appeal may be taken from his own ruling. This Court's repeated references to the writs as *discretionary* remedies is a recognition that there is a need for flexibility in this area.

In light of the tests which this Court has prescribed,

* See 28 U.S.C. §§ 1291, 1651, 62 Stat. 929, 944 (1948).

there is no reason to fear that the courts of appeals will abuse their discretionary power to deal with exceptional situations. The care with which the Court of Appeals here approached this problem is reflected in its opinion, which refused mandamus with respect to other erroneous portions of Judge Decker's disclosure order. See pp. 6-7 n., *supra*. In determining that the crippling "control group" limitation upon the privilege was unsound as a matter of law, the Court of Appeals clearly was acting within the scope of its discretionary power—and there is no occasion or need to second-guess it.

Plaintiffs take the position that because Judge Decker's ruling followed other authorities in other circuits, the Court of Appeals could not issue the writ. In part, this argument rests on the erroneous assumption that Judge Decker was following "an uncontradicted line of federal cases" and "all relevant federal law" (Pl. Br., pp. 10-11). As we have shown in Section I-B, *supra*, this assumes that the law on this subject sprang full-blown from Judge Kirkpatrick's brow in 1962, and ignores the large body of authorities (including many federal and state cases, Wigmore, the Model Code and the Uniform Rules, discussed *supra*, pp. 17-18, 28-35) which are directly contrary to, and inconsistent with, the "control group" test. The statements of the Tenth Circuit in *Natta* and of the California District Court in *Garrison*, *supra*, pp. 39-40, where the soundness of the "control group" test was not raised or argued, plainly did not comprise "all" of the relevant federal law on the point.

Nor is a trial court ruling immune from mandamus because cases in some other jurisdictions may be found to support it. When a question of law is so important as to justify immediate determination by an appellate court, an authoritative determination of the correct rule of law for the area over which the appellate court has jurisdiction is

no less necessary because some non-controlling authorities may support the trial court's view. With decisions elsewhere seemingly in conflict, there was all the more reason for the Court of Appeals here to attempt to eliminate the conflict regarding a matter of such great importance, at least for its circuit, without leaving the issue in doubt for the years which might elapse before the issue was raised in an appeal from a final judgment.* Thus the mere fact that Judge Decker relied in complete good faith on authorities elsewhere—which gave insufficient reason (or none at all) for their conclusions—does not preclude issuance of the writ.

Plaintiffs argue that the remedial inadequacy of appeal after disclosure of confidential material would be the same for all interlocutory denials of a privilege, and that therefore the decision below invites widespread use of mandamus to review interlocutory rulings. This ignores the basic premise on which the Court of Appeals' decision rested—that "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice" (App. 63). Only when an interlocutory decision presents an issue of law of great importance to the parties and the public is issuance of the writ warranted.

That is what this Court's mandamus decisions establish. The Court of Appeals here did not abuse *its* discretion in holding that the question whether the attorney-client privilege would continue to be applicable to most business transactions was of sufficiently exceptional importance to warrant issuance of the writ.

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* If the actions are settled before trial, or if defendants prevail on the merits, the Seventh Circuit would never have had an opportunity to review Judge Decker's decision on this issue.

CONCLUSION

For the above reasons, the judgment of the Court of Appeals should be affirmed.

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